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No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Pyramid Lake Paiute Tribe of Indians is barred from asserting its claimed reserved right to Truckee River water for fishery purposes by the res judicata effect of the 1944 decree in a suit quieting title to Truckee River water rights in Nevada even though:

a) The Tribe was not a party to the prior suit;

b) The United States purported to represent the interests of both the Pyramid Lake Reservation and the Newlands Reclamation Project in the prior suit and the assertion of the water right for fishery purposes would have conflicted with the water rights sought for the Newlands Project;

c) The Tribe's claimed water right for fishery purposes was not actually litigated in the prior suit;

d) The government's attorneys did not believe that the Tribe's water right for fishery purposes was placed at issue in the prior suit; and

e) The water right for fishery purposes requires proof of different facts than the Tribe's agricultural water right that was actually litigated in the prior suit.

LIST OF PARTIES

The United States was plaintiff-appellant below. The Pyramid Lake Paiute Tribe of Indians was plaintiff-intervenor-appellant. Defendants-appellees were the Truckee-Carson Irrigation District, the State of Nevada, the Sierra Pacific Power Company, the Cities of Reno and Sparks, Washoe County, and approximately 17,000 individually named persons, firms, partnerships, and corporations who have, or claim, rights to use the waters of the Truckee River or its tributaries in the State of Nevada. The Truckee-Carson Irrigation District appeared in its own right and, with others, as class representatives of approximately 4,000 water users in the Newlands Reclamation Project. *See United States v. Truckee-Carson Irrigation District*, 71 FRD 10 (D. Nev. 1975).

Nevada has filed with the Clerk of the Court a list of the approximately 17,000 defendants in this case. Nev. Pet. No. 81-2245 at ii n.*.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT CONSTITUTIONAL PROVISION	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE CROSS-PETITION	9
I. The Arguments Raised by the Cross-Petition Are Encompassed within the Petitions But Would, If Adopted, Enlarge the Relief Granted by the Court of Appeals	9
II. The Lower Court's Due Process Analysis Conflicts with Numerous Decisions of this Court	10
III. The Tribe's Fishery Water Right Was Not Part of the Government's *Orr Ditch* Cause of Action	15
IV. The Res Judicata Defense Is Not Available to Non-*Orr Ditch* Parties	18
CONCLUSION	19
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:	Page
Andrus v. Idaho, 445 U.S. 715 (1980)	10
Armstrong v. Manzo, 380 U.S. 545 (1965)	11
Barry v. Barchi, 443 U.S. 55 (1979)	11
Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313 (1971)	10, 16
California v. United States, 438 U.S. 645 (1978)	7
Cappaert v. United States, 426 U.S. 128 (1976)	3
Cromwell v. County of Sac, 94 U.S. 351 (1877)	18
Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977)	9
Estates Theatres, Inc. v. Columbia Pictures Indus., Inc., 345 F. Supp. 93 (S.D. N.Y. 1972)	13
Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)	12, 14
Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978)	13
Glasser v. United States, 315 U.S. 60 (1942)	13
Greene v. United States, 376 U.S. 149 (1964)	16
Griffin v. Griffin, 327 U.S. 220 (1946)	11
Hankerson v. North Carolina, 432 U.S. 233 (1977)	9
Hansberry v. Lee, 311 U.S. 32 (1940)	*passim*
Hanson v. Denckla, 357 U.S. 235 (1958)	11
Heckman v. United States, 224 U.S. 413 (1912)	14
Holloway v. Arkansas, 435 U.S. 475 (1978)	12
Ickes v. Fox, 300 U.S. 82 (1937)	14
Lugar v. Edmundson Oil Co., —— U.S. —— (No. 80-1730, June 25, 1982)	13
Menendez v. Saks and Co., 485 F.2d 1355 (2d Cir. 1973)	10
Montana v. United States, 440 U.S. 147 (1979)	18
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	11, 12, 16
New Jersey v. New York, 345 U.S. 369 (1953)	12
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)	18
Postal Telegraph Cable Co. v. City of Newport, 247 U.S. 464 (1918)	11

TABLE OF AUTHORITIES—Continued

	Page
Schaumburg v. Citizens for Better Environment, 444 U.S. 620 (1980)	9
Schroeder v. City of New York, 371 U.S. 208 (1962)	11
Schweiker v. Hansen, 450 U.S. 785 (1981)	14
Standefer v. United States, 447 U.S. 10 (1980)	10
Union Pacific Co. v. Laramie Stock Yards Co., 231 U.S. 190 (1913)	16-17
United States v. Interstate Commerce Commission, 337 U.S. 426 (1949)	16
United States v. Johnson, 319 U.S. 302 (1943)	16
United States v. Nevada, 412 U.S. 534 (1973)	6
United States v. Nixon, 418 U.S. 683 (1974)	16
United States v. Orr Ditch Water Company, Equity No. A-3 (D. Nev.)	*passim*
United States v. Sturgeon, 27 Fed. Cas. 1357 (D. Nev. 1879), *aff'd*, 27 Fed. Cas. 1358 (9th Cir. 1879)	3
United States v. The Haytian Republic, 154 U.S. 118 (1891)	15
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	17
Von Moltke v. Gillies, 332 U.S. 708 (1948)	12
Walker v. City of Hutchinson, 352 U.S. 112 (1956)	11
Washington v. Yakima Indian Nation, 439 U.S. 463 (1979)	9
Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979)	12
Winters v. United States, 207 U.S. 564 (1908)	3, 14
Wood v. Georgia, 450 U.S. 261 (1981)	12, 13
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)	11, 17
CONSTITUTION, STATUTES, AND REGULATIONS:	
United States Constitution, Amend. V	3, 10
United States Constitution, Amend. XIV	10
25 U.S.C. § 175	14

TABLE OF AUTHORITIES—Continued

	Page
25 U.S.C. § 194	12
28 U.S.C. § 1345	6
43 U.S.C. § 371 *et seq.*, 32 Stat. 388	4
43 U.S.C. § 372	7, 14
43 U.S.C. § 419	14
43 U.S.C. § 461	14
43 U.S.C. § 498	14
43 U.S.C. § 614c	6
Rule 8(3), Fed. R. Civ. P.	12
Rule 23(a), Fed. R. Civ. P.	14
TREATISES:	
2 *Freeman on Judgments* § 874 (5th ed. 1925)	17
1B *Moore's Federal Practice* ¶ 0.410[1] (2d ed. 1980)	16
3B *Moore's Federal Practice* ¶ 23.70 (2d ed. 1980)	14
Restatement of Judgments § 61 (1942)	16
Restatement (Second) of Judgments § 61 (Tent. Draft No. 1, 1973)	16
Restatement (Second) of Judgments § 61.2(1)(c), (d) (Tent. Draft No. 1, 1973)	16
Restatement (Second) of Judgments § 86 (Comment f (Tent. Draft No. 2, 1975)	14
Restatement (Second) of Judgments § 86(d) (Tent. Draft No. 2, 1975)	13
Restatement (Second) of Judgments § 86(e) (Tent. Draft No. 2, 1975)	13
6 *Waters and Water Rights* Chapts. 28, 29 (R. Clark ed. 1972)	17
6 *Waters and Water Rights* § 513.2 (R. Clark ed. 1972)	17
16 Wright, Miller, Cooper & Gressman *Federal Practice and Procedure: Jurisdiction* § 4004 (1977)	10

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CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT[1]

OPINIONS BELOW

The district court's February 5, 1975 decision ordering a separate trial on the affirmative defenses of res judicata and collateral estoppel and granting the United

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[1] Petitions for writs of certiorari to review the same decision have been filed by the State of Nevada, No. 81-2245, and by the Truckee-Carson Irrigation District (TCID), No. 81-2276. Both petitioners filed separately bound Appendices pursuant to Supreme Court Rule 21.1(k). Cross-Petitioner Pyramid Lake Paiute Tribe of Indians adopts those Appendices for purposes of tnis Cross-Petition. Unless otherwise noted, all references in this Cross-Petition will be to the Appendix filed by TCID in No. 81-2276. Such references will be indicated simply by the page number of that Appendix, *e.g.*, "A-15." Nevada's Appendix in No. 81-2245 will be cited as "Nev. App."

Supplemental materials that constitute part of the record in this case to which reference is made in this Cross-Petition are included in the Appendix to this Cross-Petition. That Appendix will be cited as "Tribe App."

States' Motion to Certify the Class composed of the water users on the Newlands Reclamation Project is reported at 71 FRD 10 (D. Nev. 1975). The district court's December 12, 1977 Memorandum Decision, Findings of Fact and Conclusions of Law, Certificate under Rule 54(b) Fed. R. Civ. P. and 28 U.S.C. § 1292(b), and Stay of Further Proceedings and Judgment are not reported. They are reproduced in Nev. App. at 161a-196a, and are partially reproduced at A-72 to A-110.[2]

The June 15, 1981 Opinion of the Court of Appeals for the Ninth Circuit, as amended by its July 10, 1981 Order, is reported at 649 F.2d 1286. It is reproduced in its unamended form in Nev. App. at 197a-253a and in its amended form at A-1 to A-65. The July 10, 1981 Order is reproduced in Nev. App. at 254a-255a. The Ninth Circuit's January 5, 1982 Order amending its prior opinion is reported at 666 F.2d 351, and is reproduced in Nev. App. at 256a-259a, and at A-66 to A-69. The Ninth Circuit's March 11, 1982 Order denying petitions for rehearing and rejecting a suggestion for rehearing en banc is not reported. It is reproduced in Nev. App. at 260a-261a, and at A-70 to A-71.

JURISDICTION

The Court of Appeals' decision was issued on June 15, 1981. It was subsequently modified by Orders dated July 10, 1981, and January 5, 1982. Petitions for Rehearing were denied and a Suggestion for Rehearing En Banc was rejected by Order dated March 11, 1982.

This Cross-Petition is filed pursuant to Supreme Court Rule 19.5. Nevada's Petition for Certiorari, No. 81-2245, was received on June 9, 1982. TCID's Petition for Certiorari, No. 81-2276, was received on June 11, 1982.

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[2] TCID's Appendix omits the district court's Judgment and Certificate under Rule 54(b) Fed. R. Civ. P. and 28 U.S.C. § 1292(b) and Stay of Further Proceedings which are reproduced in Nev. App. at 193a-196a.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides in part:

> No person shall . . . be deprived of life, liberty or property, without due process of law. . . .

STATEMENT OF THE CASE

This suit was brought by the United States, and joined by the Pyramid Lake Paiute Tribe of Indians, to establish their right to the water necessary to maintain and preserve the Pyramid Lake and Truckee River fisheries. Water is sought for two related uses: for flows in the Truckee River for natural reproduction of the lake's two principal fish, the Lahontan cutthroat trout and the cui-ui, and for Truckee River inflows to maintain the level of the lake and the quality of its waters on a long-term basis. The Tribe and the United States contend that water for this fishery purpose was reserved when the Pyramid Lake Indian Reservation was set aside in 1859. *See Winters v. United States*, 207 U.S. 564 (1908); *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. Sturgeon*, 27 Fed. Cas. 1357 (D. Nev. 1879), *aff'd*, 27 Fed. Cas. 1358 (9th Cir. 1879).

Pyramid Lake and its once world famous fishery are the heart and soul of the Pyramid Lake Indian Reservation and have provided the sustenance and the livelihood of the members of the Pyramid Lake Paiute Tribe of Indians since time immemorial. The Truckee River is the lake's lifeline. One of the purposes for establishing the Pyramid Lake Indian Reservation, which includes all of Pyramid Lake and the lower 20 miles of the Truckee River, was "to provide the Indians with access to Pyramid Lake and at least the lower reaches of the Truckee River in order that they might obtain their sustenance,

at least in part, from these historic fisheries." A-3 to A-4, A-10 to A-14, A-97 to A-99.

Owing primarily to the diversion of "almost the whole volume of the Truckee River" to the Newlands Reclamation Project, which was authorized pursuant to the federal Reclamation Act of 1902, 43 U.S.C. 371 *et seq.*, 32 Stat. 388, the Pyramid Lake fishery has been virtually destroyed. The Lahontan cutthroat trout, which once grew to more than 40 pounds in Pyramid Lake, is currently classified as a threatened species; the cui-ui, which is found only in Pyramid Lake, is listed as an endangered species. A-2 to A-4, A-10 to A-14.

In 1913, the United States initiated a suit to quiet title to Truckee River water rights in Nevada, *United States v. Orr Water Ditch Company*, Equity No. A-3 (D. Nev.), hereafter *"Orr Ditch."* Trial took place between 1919 and 1921, and the final decree was entered in 1944. A-9, A-15. "[T]he primary purpose of *Orr Ditch* was to secure the water rights for the [Newlands] reclamation project." A-75. *See also*, A-99. The United States sought and obtained the largest possible water right for the Newlands Project, A-4 to A-9, A-14 to A-15, A-233 to A-234, but limited its claims on behalf of the Pyramid Lake Indian Reservation to relatively small irrigation rights that would not conflict with the rights claimed for the Newlands Project. A-2, A-7 to A-13, A-53 to A-54, A-77 to A-79, A-101 to A-102, A-104 to A-105. A water right to fulfill the fishery purpose of the Pyramid Lake Indian Reservation was not actually asserted or litigated during the course of the *Orr Ditch* proceedings. A-2, A-55, A-104.

Throughout the *Orr Ditch* proceedings, the United States purported to represent the interests of both the Pyramid Lake Indians and the Newlands Project's water users. A-51 to A-52. The Tribe did not participate in the *Orr Ditch* litigation. It was not consulted by government officials responsible for its prosecution, and was

not asked to, and did not, approve the final stipulated decree. 24 Tr. 4483, 25 Tr. 4704-05, 4710-11, 42 Tr. 8553-54, 43 Tr. 8792, Tribe App. at 1a-3a. Newlands Project water users retained attorneys who participated in the negotiations that led to the Truckee River Agreement,[3] but they were never joined as parties, and the United States "never relinquished or limited its representation of the Project's interests." A-55.

Government officials were aware of the potential claim of a water right to maintain and preserve the Tribe's Pyramid Lake and Truckee River fisheries. No such claim was asserted in the *Orr Ditch* litigation, however, because of "the larger interests involved in the proposition, having to do with the reclamation of thousands of acres of arid and now useless land for the benefit of the country as a whole." A-10 to A-13, A-52 to A-55, A-72 to A-79, A-92 to A-93, A-100, A102, A-104, A-105 to A-106.

The government attorneys responsible for handling the *Orr Ditch* litigation expressly stated their understanding that the Tribe's water right for fishery purposes was not involved in the suit because:

> nothing is said about fish or water to be used for fish passing up and down the stream [in the bill of complaint and] nothing is said about this subject in any pleadings, nor was any testimony taken or any suggestions made from the beginning of the case down to the present time regarding fish.

A-12. At one time, however, the *Orr Ditch* court was apprised of the conflict between the water needs of the Pyramid Lake fishery and diversions to the Newlands Reclamation Project by a government official employed

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[3] The Truckee River Agreement was incorporated in the *Orr Ditch* Final Decree, but neither the Agreement nor the Decree addressed the Tribe's water right for fishery purposes that is claimed in this suit. *See*, A-14 to A-15.

by the Bureau of Indian Affairs. Ex. A-408, Tribe App. at 4a-5a.

Owing to insufficient Truckee River inflow, Pyramid Lakes' Lahontan cutthroat trout population was destroyed by the early 1940's. The cui-ui barely survived. Restoration efforts for the trout began almost immediately. A-2, A-10 to A-14. A successful stocking program initiated by the State of Nevada eventually led to the enactment of Section 4 of the Washoe Project Act of 1956, 43 U.S.C. § 614c, which mandates restoration of the Pyramid Lake fishery. A-14, A-57 to A-58. In 1976, the United States completed construction of the Marble Bluff Dam and Fishway which enable the trout and the cui-ui to bypass the delta at the mouth of the Truckee River and to ascend to their spawning grounds. A-14. These restoration efforts combined with an extensive hatchery stocking program for the trout "appear to justify optimism for eventual success." A-14, A-98 to A-99.

In 1972, the United States initiated an original action in this Court against the States of Nevada and California to establish the Tribe's water right for fishery purposes. The government's Motion for Leave to file its Complaint was denied without prejudice because of the availability of relief in the federal district courts. *United States v. Nevada*, 412 U.S. 534 (1973).

In 1973, the United States filed a complaint in Nevada federal district court pursuant to 28 U.S.C. § 1345 alleging, *inter alia*, that in establishing the Pyramid Lake Reservation in 1859 there was reserved for the Tribe's benefit sufficient Truckee River water for the maintenance and preservation of the Pyramid Lake and Truckee River fisheries. The Pyramid Lake Tribe intervened as a plaintiff. The defendants consisted of all adverse claimants to the waters of the Truckee River and its tributaries in Nevada, including the class consisting of all water users within the Newlands Reclamation Project. Over the objections of the Tribe and the

United States, the district court bifurcated the case and limited the initial trial to the issues of res judicata and collateral estoppel. A-2 to A-3, A-16 to A-17; 71 FRD 10.

The district court found that the claimed water right for fishery purposes had not actually been litigated in the *Orr Ditch* litigation. Accordingly, the collateral estoppel defense was rejected. A-104, A-108.[4] Although recognizing the fishery purpose of the Pyramid Lake Reservation, A-97 to A-98, the district court dismissed the Tribe's complaint with prejudice. It also dismissed all of the government's complaint except for the causes of action for water rights not having to do with Pyramid Lake. "[P]rimary reliance [was] place[d] upon passage of the 1902 Reclamation Act." A-73. *See also*, A-17 to A-18, A-20 to A-21. That Act was held to have authorized the extinguishment of the Tribe's fishery water right for the benefit of the Newlands Reclamation Project, and the Secretary of the Interior was said to have exercised that authority by not asserting that right in the *Orr Ditch* litigation. A-72 to A-79, A-92 to A-93, A-100, A-102, A-105. Accordingly, the district court ruled that the United States did not have a "prohibited" or "impermissible" conflict of interest in the *Orr Ditch* case. The Tribe and the United States were held barred from litigating the fishery water right which was found to have been a relinquished part of the government's *Orr Ditch* cause of action. A-104, A-105 to A-106, A-108.

The court of appeals affirmed in part, reversed in part, and remanded the case for trial. It overturned the district court's reliance on the Reclamation Act, holding that Section 8 of that law, 43 U.S.C. § 372, as construed in *California v. United States*, 438 U.S. 645 (1978), prevents the Secretary from extinguishing Indian water rights for the benefit of reclamation projects.

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[4] No appeal was taken from this determination.

A-21 to A-29. Nor was the Tribe's water right extinguished by congressional ratification subsequent to *Orr Ditch*. A-57 to A-58.[5]

On res judicata, the court of appeals first affirmed the district court's holding that the fishery water right was encompassed in the government's *Orr Ditch* cause of action. A-31 to A-34. Then the court reviewed the Tribe's contention that preclusion of its claimed fishery water right would result in a denial of procedural due process owing to the government's inadequate and improper representation of the Tribe's interests in the *Orr Ditch* litigation. A-34 to A-50. It ruled that the Tribe is entitled to due process protection, A-34 to A-47, and assumed, and later in the opinion found, that the government's representation of the Tribe in *Orr Ditch* was improper and inadequate. A-46 to A-47, A-48 to A-49, A-52. But the Tribe's constitutional right to procedural due process was held to have been satisfied based on the trial court's finding that the *Orr Ditch* defendants did not have actual knowledge of the government's failure to represent the Tribe adequately. A-45 to A-47, A-68. The end result of this analysis was that the Tribe was foreclosed from litigating its claimed fishery water right against the *Orr Ditch* defendants, their successors in interest, and subsequent appropriators. A-47 to A-50.

But the court rejected the res judicata defense of TCID and the water users on the Newlands Project. The interests of both the Project and the Pyramid Lake Reservation were represented by the same government attorneys, so there was no adversity between the Tribe and TCID. Since the fishery water right was not actually litigated in *Orr Ditch*, res judicata could not bar the Tribe's claim against co-nonparties who were repre-

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[5] The petitions for certiorari filed by Nevada and TCID do not take issue with these aspects of the court of appeals' decision.

sented simultaneously by the same government attorneys. A-50 to A-55.

The case was remanded for determinations of whether the Tribe is entitled to a water right for its fishery and, if so, how much water is needed to satisfy that right. Any water subject to the *Orr Ditch* decree that is awarded to the Tribe for fishery purposes would have to come out of the government's entitlement. A-59, A-68.

Nevada and TCID have asked this Court to review the portion of the Ninth Circuit's judgment holding that the Tribe's claims against TCID and Newlands Project water users are not barred by res judicata.

REASONS FOR GRANTING THE CROSS-PETITION

I. The Arguments Raised by the Cross-Petition Are Encompassed within the Petitions But Would, if Adopted, Enlarge the Relief Granted by the Court of Appeals.

The issue in this case is whether the *Orr Ditch* decree precludes the Pyramid Lake Tribe from litigating its claimed fishery water right against any or all of the defendants in this case. The court of appeals upheld the res judicata defense of all of the defendants except TCID and the water users on the Newlands Reclamation Project. In route to that conclusion, that court rejected several contentions of the Pyramid Lake Tribe which, if accepted, would have resulted in the Tribe prevailing against all of the defendants. These contentions are the primary subject of this Cross-Petition.

As respondent, the Pyramid Lake Tribe "may make any argument presented below that supports the judgment of the lower court." *Hankerson v. North Carolina*, 432 U.S. 233, 240 n. 6 (1977). *See also, Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 634 n. 8 (1980); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979); *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419 (1977). But insofar as the

Tribe's arguments, if successful, would enlarge the relief granted by the court of appeals' judgment, the Tribe must cross-petition as a condition precedent to obtaining such relief. *Andrus v. Idaho*, 445 U.S. 715, 725 n. 6 (1980).

With one limited exception (see *infra* at 18-19), the Tribe's Cross-Petition does not interject issues into this case that otherwise would be absent; they would be raised by the Tribe as respondent if either TCID's or Nevada's Petition is granted. The Cross-Petition is necessary, however, in order to insure that the Tribe obtains the full benefit of prevailing on issues that were considered and rejected by the court of appeals if this Court affirms the judgment against TCID on grounds that would also apply to the other defendants. This Cross-Petition also serves the additional function of informing the Court of the issues that the Tribe would wish to raise in the event certiorari is granted. *See*, 16 Wright, Miller, Cooper & Gressman *Federal Practice and Procedure: Jurisdiction* § 4004 at 523 (1977).

II. The Lower Court's Due Process Analysis Conflicts with Numerous Decisions of This Court.

Res judicata is an equitable, judicially created, doctrine aimed "at the achievement of substantial justice." It embodies the principle, guaranteed by the due process clauses of the Fifth and Fourteenth Amendments to the Constitution, that a litigant is entitled to "one full and fair opportunity for judicial resolution" of an issue or a claim. *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313, 325, 328, 329, 334 (1971). *See also, Standefer v. United States*, 447 U.S. 10, 22, 24 (1980); *Hansberry v. Lee*, 311 U.S. 32 (1940); *Menendez v. Saks and Company*, 485 F.2d 1355, 1364 (2d Cir. 1973) ("The doctrine of res judicata is subject to the overriding public policy that 'a party must not be deprived of an actual opportunity to be heard.'")

The Court has consistently denied res judicata effect to proceedings found lacking in procedural due process. *World-Wide Volkewagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965); *Schroeder v. City of New York*, 371 U.S. 208 (1962); *Hanson v. Denckla*, 357 U.S. 235, 255 (1958); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956); *Griffin v. Griffin*, 327 U.S. 220, 228-29 (1946); *Hansberry v. Lee*, 311 U.S. 32, 40, 41, 45 (1940). As stated in the leading case of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

See also, Postal Telegraph Cable Co. v. City of Newport, 247 U.S. 464, 476 (1918) (citations omitted):

> The opportunity to be heard is an essential requisite of due process of law in judicial proceedings . . . [A] state may not, consistently with the 14th Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard . . . .

The court of appeals appears to have recognized these principles. A-34 to A-35. But instead of resolving this issue on the basis of whether the Tribe had an "opportunity to be heard 'at a meaningful time and in a meaningful manner,'" *Barry v. Barchi*, 443 U.S. 55, 66 (1979), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), the lower court inexplicably shifted its focus to whether the *Orr Ditch* defendants had actual knowledge of the government's improprieties. A-45 to A-47, A-68.[6]

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[6] There is no basis for the district court's finding, A-107, that the *Orr Ditch* defendants lacked knowledge of the government's conflict of inteerst. There was no testimony in this case from

This constitutes clear and reversible error because the procedural due process rights of the Tribe do not depend upon what its potential adversaries knew or did not know. The only relevant inquiries are whether the Tribe received notice that its fishery water right was at issue in *Orr Ditch* and whether the Tribe was denied a full and fair opportunity to be heard as a result of the government's conduct. The record is clear that no notice was provided. 24 Tr. 4483; 25 Tr. 4704-05, 4710-11, Tribe App. 1a-2a (defendants' witness). The law is equally clear that representation by a "faithless fiduciary" burdened by a conflict of interest which precludes fulfillment of its duty of undivided loyalty to its beneficiary, *see*, A-49, A-52, does not provide either a "meaningful" or a "full and fair" opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Hansberry v. Lee*, 311 U.S. 32 (1940). *See also, Wood v. Georgia*, 450 U.S. 261 (1981); *Holloway v. Arkansas*, 435 U.S. 475, 481 (1978); *New Jersey v. New York*, 345 U.S. 369, 373-74 (1953); *Von Moltke v. Gillies*, 332 U.S. 708, 825-26 (1948) (plurality

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Orr Ditch defendants or their attorneys or anyone else concerning what anyone knew about the quality of the government's representation of the Tribe's interests between 1913 and 1944. On the other hand, the district court found that practically everyone knew about the decline of the Pyramid Lake and Truckee River fisheries. A-101, A-102. As a matter of law the defendants are chargeable with knowledge of the public laws defining the government's obligations to Indian tribes and reclamation projects. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947); *infra* at 14 n.8. The burden of proof for all of the elements of res judicata rests on the defendants not only because it is an affirmative defense, Fed. R. Civ. P. 8(3), but also because of 25 U.S.C. § 194. *See*, Wilson v. Omaha Indian Tribe, 442 U.S. 653, 664-69 (1979). In these circumstances, the district court's finding concerning the *Orr Ditch* defendants' lack of knowledge was clearly erroneous and should not have been followed by the court of appeals.

There is reason to believe that the district court's finding may have been the product of improperly placing the burden of proof on the Tribe. A-107 (Findings 32 and 33).

opinion); *Glasser v. United States*, 315 U.S. 60, 70, 75-76 (1942); *Estates Theatres, Inc. v. Columbia Pictures Indus., Inc.*, 345 F. Supp. 93, 98-99 (S.D. N.Y. 1972).

The court of appeals' reliance on Section 86(e) of the Restatement (Second) of Judgments (Tent. Draft No. 2, 1975), *see*, A-37, A-45 to A-47, is misplaced. That provision does not purport to define or implement the procedural due process guarantees of the Fifth or Fourteenth Amendments. Rather, it governs relationships between private representatives and their beneficiaries that are not restrained or limited by due process considerations. *See Lugar v. Edmundson Oil Co.*, —— U.S. —— (No. 80-1730, June 25, 1982); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156-57 (1978). Where, as here, a nonparty is denied a meaningful, or a full and fair, opportunity to be heard as a result of state or federal action, the opposing parties' knowledge or lack of knowledge is entirely irrelevant.[7]

This analysis is supported by the Restatement (Second) of Judgments, *supra*. Section 86(d) of the Restatement (Second), quoted at A-37, applies to class actions and provides that members of a class are not bound if there was a substantial divergence of interest between the representatives and the members that pre-

[7] Since only government officials are bound by due process constraints, it is their actual or imputed knowledge, not that of the *Orr Ditch* defendants, which could have any conceivable bearing on the issue of whether the Tribe was denied a full and fair opportunity to be heard. The district court found that federal officials were aware of the potential tribal claim of a water right for fishery purposes and they knew that such a claim would conflict with the government's claim to Truckee River water for the Newlands Project. A-72 to A-79, A-100, A-102, A-105 to A-106, A-107. The record also shows that the federal district judge presiding over the *Orr Ditch* litigation was apprised of the government's conflict in seeking Truckee River water for both the Pyramid Lake Reservation and the Newlands Project. Tribe App. 4a-5a. Such knowledge also triggers due process concerns. *See* Wood v. Georgia, 450 U.S. 261 (1981).

vented fair representation of the members' interest. There is no mention in the Restatement (Second) of whether this divergence of interest was known to other parties in the litigation. Immediately following the portion of Comment f to Section 86 quoted by the court of appeals, A-46, the Restatement (Second) goes on to state that adequacy of representation of nonparties in actions by or against public agencies or officials should be determined by the same standard that is applicable to class actions. Comment f to the Restatement (Second), *supra*, at 77.[8] Judged by that standard, the *Orr Ditch* decree

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[8] Class actions and government representation of nonparties' interests are alike in several relevant respects. Class actions are "an invention of equity," Hansberry v. Lee, *supra*, 311 U.S. at 41, in which "[i]n a very real sense, [the judge] is the guardian of the interests of the absentees." 3B *Moore's Federal Practice* ¶ 23.70 (2d ed.) Consequently, both class actions and representation of non-parties' interests by government attorneys implicate the due process constraints of the Fifth and Fourteenth Amendments against state and federal action. Second, class representatives are subject to open and public scrutiny by the court and the parties to insure that they "will fairly and adequately protect the interests of the class." Rule 23(a), Fed. R. Civ. P. Similarly, the multiple and at times conflicting interests served by government attorneys are matters of public record, knowledge of which is chargeable to opposing litigants. Schweiker v. Hansen, 450 U.S. 785 (1981), *reaffirming* Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947). In this case, for example, the government's actual representation of the interests of both the Pyramid Lake Reservation and the Newlands Reclamation Project was apparent on the face of the *Orr Ditch* Amended Complaint, Nev. App. 2a-11a, and the government's conflicting legal responsibilities to the Tribe and to the Newlands Project water users are based on public laws and are manifested in judicial decisions. *See* 25 U.S.C. § 175; Heckman v. United States, 224 U.S. 413 (1912); Winters v. United States, 207 U.S. 564 (1908); 43 U.S.C. §§ 372, 419, 461, 498; Ickes v. Fox, 300 U.S. 82, 94-95 (1937). By contrast, in the case of banks, insurance companies and other private fiduciaries, it would be virtually impossible for an opposing party to ascertain the full range of the representative's own interests and those of all of its beneficiaries that could conceivably conflict with its responsibility

cannot deprive the Pyramid Lake Tribe of its constitutional entitlement to one full and fair day in court. *Hansberry v. Lee*, 311 U.S. 32 (1940).

This Court should review and reverse the court of appeals' departure from the long and consistent lines of Supreme Court decisions holding that due process is denied when state or federal action results in the representation of conflicting interests by the same attorneys and that proceedings found lacking in due process cannot be given res judicata effect.

III. The Tribe's Fishery Water Right Was Not Part of the Government's *Orr Ditch* Cause of Action.

During the course of the *Orr Ditch* litigation, the Justice Department attorneys responsible for the case unequivocally stated their belief that the claim of a water right for fishery purposes was entirely outside of its scope. A-12 to A-13; partially quoted *supra*, at 5. The basis for this belief was that nothing was said about fish or about the need for water for fish purposes in the complaint or any in any other pleading or in any of the testimony. *Id.* There are also indications that the government attorneys viewed disputes involving conflicts between the interests of the Newlands Project and the Pyramid Lake Indian Reservation as administrative matters, not questions for litigation. A-54 n. 21.

The lower court acknowledged that quantifying the Tribe's water right for fishery purposes and its right to water for agricultural purposes requires proof of different facts. A-32. Under the "same evidence" test for determining identity of claims set forth in *United States v. The Haytian Republic*, 154 U.S. 118, 125 (1891), and

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to a particular beneficiary in a specific suit. Therefore, in the private setting, the requirement of actual notice of inadequate representation is a practical necessity. Since no governmental action is involved, the due process clauses are not applicable.

Section 61 of the Restatement of Judgments (1942), the water right for fishery purposes would be considered a separate cause of action from the agricultural water right asserted for the Pyramid Lake Reservation by the government in *Orr Ditch*. A-32. But the court of appeals held that the " 'same evidence' test is but one of many tests used to distinguish one cause of action from another," citing more recent authorities, 1B *Moore's Federal Practice* ¶ 0.410[1], at 1157-58 (2d ed. 1980); and the Restatement (Second) of Judgments § 61 (Tent. Draft No. 1, 1973). A-32. Applying the more modern criteria, the fishery water right was held to be part of the government's *Orr Ditch* cause of action. A-33.[9]

It is true that the trend of the case law in recent years has been toward "expansion of the definition of claim in bar and merger contexts." *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313, 327 (1971).. But it is fundamentally unfair to apply these new standards retroactively so as to deprive the Tribe of its most valuable property by barring a claim that might have been asserted in litigation commenced in 1913, tried from 1919 to 1921, and finally completed in 1944. *Cf. Greene v. United States*, 376 U.S. 149, 160 (1964); *Union Pacific Co. v. Laramie Stock*

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[9] Even if the more "pragmatic" test of Section 61 of the Restatement (Second) of Judgments (Tent. Draft No. 1, 1973) is applied, the fishery water right should be held to be a separate cause of action because: (i) it requires proof of different facts; (ii) it should not and could not have been asserted by government attorneys who were also representing the conflicting interests of the Newlands Reclamation Project, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); and (iii) it would not have presented a justiciable issue even if it had been asserted. *See* United States v. Johnson, 319 U.S. 302 (1943); Restatement (Second) of Judgments § 61.2(1)(c), (d) (Tent. Draft No. 1, 1973). *Compare*, United States v. Nixon, 418 U.S. 683, 693-97 (1974); United States v. Interstate Commerce Commission, 337 U.S. 426, 430-32 (1949).

Yards Co., 231 U.S. 190, 199 (1913) ("The rule [to consider legislation as addressed to the future, not to the past] is one of obvious justice, and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed.")[10] Accordingly, the determination of whether the fishery water right should have been claimed in *Orr Ditch* should be made by reference to the standards applicable at the time that litigation was pending. Based on those standards, the Justice Department attorneys correctly concluded that the fishery water right was not part of the government's *Orr Ditch* cause of action.[11]

The fundamental unfairness of the lower court's retroactive application of a new standard to deprive the Tribe of its most cherished and valuable asset merits this Court's review and reversal.

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[10] The retroactive application of new laws raises significant due process concerns in its own rights. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14-20 (1976).

[11] This conclusion is also supported by the fact that *Orr Ditch* was a quiet title, *in personam* action, not the more modern type of statutory *in rem* proceeding known as a general stream adjudication. *See generally*, 6 *Waters and Water Rights* Chapts. 28, 29 R. Clark ed. 1972. In quiet title actions, the subject matter and reach of the judgment are confined to what the plaintiff places at issue and the adverse claims raised by the defendants. 2 *Freeman on Judgments* § 874 (5th Cir. 1925); 6 *Waters and Water Rights* § 513.2 (R. Clark ed. 1972). In this case, the only property placed at issue by the United States were the irrigation rights of the Newlands Project and the Pyramid Lake Reservation. The fact that the government, the other *Orr Ditch* parties, and the *Orr Ditch* court intended to make the adjudication as comprehensive as possible, see A-33, cannot alter the essential nature of the action or extend the court's jurisdiction. *See* World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980).

IV. The Res Judicata Defense Is Not Available to Non-*Orr Ditch* Parties.

The court of appeals obviously erred in upholding the res judicata defense of subsequent (*i.e.*, post-1944) appropriators of Truckee River water who are neither *Orr Ditch* parties nor successors in interest to *Orr Ditch* parties. A-49. *Orr Ditch* was not an *in rem* action, A-49, and the subsequent appropriators were not *Orr Ditch* parties. Therefore, the *Orr Ditch* cause of action and the cause of action asserted in this case against the subsequent appropriators are different "by definition." *Montana v. United States*, 440 U.S. 147, 154 (1979). When different causes of action are involved, the preclusion defense automatically "fall[s] under the rubric of collateral estoppel rather than res judicata." *Montana v. United States*, 440 U.S. 147, 154 (1979).

Unlike res judicata, preclusion by operation of collateral estoppel requires the actual litigation and determination of the precise issue in the prior litigation; it is not sufficient that an issue could or should have been litigated. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5 (1979); *Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1877); A-34 n. 11. Since both lower courts expressly found that the fishery water right was not actually litigated in *Orr Ditch*, A-55, A-104, A-108, the Tribe cannot be barred from asserting its claimed water right for fishery purposes against non-*Orr Ditch* parties.

The court of appeals' decision allowing nonparties to take advantage of res judicata merits review because it is inconsistent with this Court's holdings that the preclusion defense available to nonparties is collateral estoppel, not res judicata.

CONCLUSION

The Pyramid Lake Tribe's Cross-Petition for a Writ of Certiorari should be granted if the Court agrees to hear Nevada's Petition, No. 81-2245, or TCID's Petition, No. 81-2276.

Respectfully submitted,

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July 1982

APPENDIX

24 Tr. 4483:

Q. BY MR. SWAFFORD: Professor Hulse, will you then please explain your reasons for coming to that conclusion.

A. In looking through the files and records of the Pyramid Lake Paiute Tribe which were deposited at the University of Nevada about ten years ago, I looked strenuously and expectively for a file on the Orr Ditch case and I didn't find one.

I thought that there would be some expression of interest or approval or disapproval or disappointment, but it does not appear in any of the minutes that I was able to see, nor in any of their correspondence.

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25 Tr. 4704-05:

Q. BY MR. PELCYGER: Now, in your research, Professor Hulse, did you come across any evidence that any representatives of the government ever discussed the Orr Water Ditch case with the Pyramid Lake Indians?

A. I have found no evidence one way or another on that.

Q. What do you mean you found no evidence one way or the other? Did you find any evidence that that had occurred?

A. No, I did not.

Q. Did you find evidence, for example, that representatives of the Bureau of Indian Affairs and the United States Government, for example, constantly throughout the period of the Orr Ditch case were discussing with the Pyramid Lake Indians the developments in the Squatters controversy?

A. There was frequent communication with them on the Squatter controversy.

Q. Did you encounter any evidence whatsoever, Professor Hulse, to indicate that the Pyramid Lake Indians

or the Pyramid Lake Tribe were ever invited to participate or suggested that they participate in the Orr Water Ditch case by either government officials or anybody else?

A. No, I did not.

Q. Is there any evidence that you encountered, Professor Hulse, that the Pyramid Lake Tribe was consulted before the final decree was approved in 1944?

A. No, I found no evidence on that.

25 Tr. 4710-11:

A. What I'm saying is that the legal entity, the Pyramid Lake Paiute Tribe, did not exist, so far as I know, prior to 1934.

Q. Okay. But they did act and they did meet from time to time and they passed resolutions; they passed petitions, and they made their views known?

A. From time to time, that is true, yes, the Pyramid Lake Paiutes did. Whether you call them a Tribe, that's the question I'm having trouble with, you see.

Q. Now, during that entire period of historical record that you examined, did you ever come across any indication that the Tribe, acting at a meeting such as this or in any other reasonably formal way, ever acquiesced in or waived or agreed to the diminishment of any water rights that they might possess for fishery purposes?

A. I understand your question. I know of no formal action by the Pyramid Lake Indians of that kind.

Q. Isn't it true, Professor Hulse, that in the last series of questions that I have asked you regarding your historical research, before the break and just now, that was exactly the sort of information that you would be looking for in your historical investigations? If you came across that kind of information, that would have been highly significant, wouldn't it?

A. That would have been, yes.

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42 Tr. 8553-54:

Q. Dr. Stewart, in your review of the documents which you have reviewed, have you found any evidence that the Pyramid Lake Indians either participated in asked to participate in the Orr Water Ditch case?

A. I found no evidence that they participated in hearings in the Orr Water Ditch case.

Q. Or that they were asked to?

A. No evidence that they were asked to.

Q. When you heard Professor Hulse's testimony, was it your understanding that his finding was to the same effect?

A. That's my understanding.

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43 Tr. 8792:

Q. BY MR. GIRARD: You indicated that you could find no documents that you were aware of that referred to the Orr Ditch case, of the Indians' knowledge of the Orr Ditch case?

A. That they were specifically instructed or informed or invited to participate or otherwise directly involved, asked to be involved, or told about what was going on, I found no such document.

EXHIBIT A-408

Carson Indian School,
Stewart, Nevada,
March 22, 1926.

Judge E. S. Farrington,
U.S. Court,
Carson City, Nevada.

Dear Judge Farrington:—

I am writing you to find out if some arrangement can be made to allow the entire flow of Truckee River to run into Pyramid for a period of about two weeks.

My reason for requesting this is that there is so little water in the Truckee River below the Derby Dam that trout and other fish in Pyramid Lake cannot get up the river to spawn. The Indians depend to a great extent upon the fish in Pyramid Lake for a livelihood and to them the question of water in the river is a very serious matter.

In past years I believe the United States Reclamation Service arranged to have the entire flow of the River run into Pyramid Lake for a short period in the Spring—the spawning season for fish—but Mr. Richardson, Superintendent of the Newlands Projects, informs me that the turning of the water into Pyramid Lake is now a matter to be handled by the United States Court.

Toward the latter end of last week there was more water running down the river and reaching Pyramid Lake than at any time during the winter. This was due to the warm weather which melted the snows in the mountains and there was more water at the Derby Dam than the canal conveying the water to the Lahonton Reservoir could carry, and consequently some was allowed to pass the Dam and run into Pyramid Lake. There was enough water running into the lake to allow

the trout to get into the river and some were going up the fish ladder at the Indian Dam a few miles from the mouth of the river.

The Indians have been asking all winter to have the waters of the Truckee River allowed to flow into the lake for a period of two weeks at this time of the year, and I trust the justice of their request is sufficiently apparent to allow favorable action.

The trout in the lake must go up the river to spawn at this time of the year, and unless there is sufficient water running into the lake the fish cannot enter the river on account of the bars at its mouth.

I shall appreciate whatever you may be able to do in arranging that the Truckee River may be allowed to flow into the Lake for a two week's period now, as the trout are beginning to spawn. A little later other fish go up the river also to spawn.

Very respectfully,

Superintendent.